FILE COPY

FILED
MAY 26 1959
JAMES R. BROWNING, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. [redacted] 78

CARMEN M. LOHR,

Petitioner,

vs.

UNITED STATES OF AMERICA, ET AL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TURNER, HENDRICK,
FASCELL & BRAKE,
Attorneys for Petitioner.

ROBERT M. BRAKE

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No.

CARMEN M. LOHR,

Petitioner,

vs.

UNITED STATES OF AMERICA, ET AL.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

COMES NOW the Petitioner, CARMEN M. LOHR, by and through her undersigned attorneys and respectfully petitions this Honorable Court for a Writ of Certiorari to review that certain Order of the United States Court of Appeals for the Fifth Circuit entered in that certain cause wherein your Petitioner, CARMEN M. LOHR, was Appellant and THE UNITER STATES OF AMERICA was Appellee, and which Order granted said Appellee's Motion to Dismiss said appeal for alleged failure by Petitioner to file a timely Notice of Appeal, and shows unto this Honorable Court as follows:

OPINIONS BELOW

The Opinion of said Court of Appeals granting said Motion to Dismiss has not yet been assigned a page number in the official and unofficial reports of the Opinions of said Court as of the date of printing this Petition.

BASIS OF JURISDICTION

Jurisdiction is conferred on this Court by the following:

a) The Order granting said Motion to Dismiss, and the Opinion of the Court of Appeals thereon, were dated and filed on March 20, 1959.

b) The Order denying Petitioner's Petition for Rehearing was dated and filed on April 16, 1959.

c) Section 1254, Title 28, U.S. Code, confers jurisdiction on this Court to review said Order by Writ of Certiorari granted upon this Petition.

QUESTION PRESENTED

The question presented for review is as follows:
WHERE THERE ARE FOUR DEFENDANTS IN A DISTRICT COURT ACTION AND ONE DEFENDANT IS DISMISSED, AND A NOTICE OF APPEAL IS IMMEDIATELY FILED AS TO SUCH DISMISSAL, AND LATER THE REMAINING DEFENDANTS ARE DISMISSED, BUT NO NEW NOTICE OF APPEAL IS FILED AS TO THE FIRST DEFENDANT, IS THE NO-

TICE OF APPEAL AS TO SAID FIRST DEFENDANT SUFFICIENT TO GIVE THE COURT OF APPEALS JURISDICTION OF THE APPEAL, OR MUST A NEW NOTICE OF APPEAL BE FILED, EVEN THOUGH THE CASE HAS BEEN DOCKETED AND THE RECORD PRINTED AND FILED WITH THE COURT OF APPEALS?

STATUTES INVOLVED

The statutes involved in this matter are as follows:

(1) 28 U.S.C. Sec. 1291, 62 Stat.929, as amended,65 Stat.726, 72 Stat. 348:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

(2) 28 U.S.C. Sec 2107, 62 Stat. 963, as amended 63 Stat. 104:

> "Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

"In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry . . ." (Remainder of section not applicable).

(3) 28 U.S.C. 2111, 63 Stat 105:

"On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

STATEMENT OF THE CASE

Petitioner, as Plaintiff below, brought an action against the United States under the Federal Tort Claims Act, 28 U.S.C. 2671, and against two individual agents of the United States and against an alleged joint tortfeasor, for the wrongful death of her husband, an airline pilot. Her complaint alleged that the aircraft had been converted from military to civilian use by use of parts which differed from those specified by the Civil Aeronautics Administration; that the difference could have been and should have been discovered by the Civil Aeronautics Administration inspector and the plane should not have been allowed to fly in the United States; and that the parts in question caused the plane to crash while in flight, killing her husband, who was the pilot of the plane.

The two individual government agents were not Florida residents and could not be served. Only the United States and Riddle Airlines, Inc. as employer and joint tortfeasor, were served.

On August 11, 1958, the District Court entered an Order dismissing the Complaint as to the United States. On August 25, 1958, Petitioner filed her Notice of Appeal from this Order. Thereafter the employer, Riddle Airlines Inc. was granted a summary judgment on November 12, 1958, based upon the Florida Workmen's Compensation Law.

On December 5, 1958, Respondent filed a Motion to Dismiss the appeal in the Court of Appeals on the grounds that inasmuch as the case below was still pending against the two non-resident and unserved defendants, the order dismissing the United States was not a final order within the meaning of 28 U.S.C. 1291. Petitioner took a nonsuit against said unserved defendants on December 9, 1958, and filed a certified copy of said Order Granting Nonsuit with the Court of Appeals.

No new Notice of Appeal from the Order Dismissing the Complaint as to the United States was thereafter filed.

On March 9, 1959, the cause was orally argued before the Court of Appeals, both on the Motion to Dismiss and on the merits of the appeal. On March 20, 1959, the Court of Appeals entered an Order dismissing the appeal, and, after a Petition for Rehearing had been filed by Petitioner, the Court of Appeals entered an Order denying said Petition for Rehearing on April 16, 1959.

ARGUMENT

The decision of the Court of Appeals is in conflict with the decision of this Court in Lemke vs U.S. 1953, 346

U.S. 325, 74 S.Ct. 1, 98 L.Ed. 3, in which case Petitioner believes this court settled the question of proper procedure where a premature notice of appeal has been filed. The case at bar is almost identical with the Lemke case, differing only in that the Lemke case arose under the Criminal Procedure Rules.

In the Lemke case the sentencing procedure on March 10 did not result in a final order within the meaning of the appeals statutes. On March 11 a premature notice of appeal was filed. On March 14 an order was entered making the proceedings final. Thereafter the Court of Appeals dismissed the case on the grounds that the Notice of Appeal was premature inasmuch as Criminal Rule 37 (a) (2) provided that an appeal "may be taken within 10 days after entry of a judgment or order appealed from . . .", and that the subsequent entry of an order making the proceedings final did not cure the premature notice. The Supreme Court reversed the Court of Appeals and held that the premature notice was cured when the case became final before the appeal was heard. Criminal Rule 52 (a) providing that any error not affecting the substantive right of the parties should be disregarded was cited as authority for the decision.

The similarities between the Lemke case and the case at bar are glaring:

(a) In both cases the procedure for taking an appeal was by filing a Notice of Appeal in the Trial Court (Civil Rule 73, 28 U.S.A. 2107; Criminal Rule 37 (a) (2)).

(b) In both cases the notice of appeal was filed before the order appealed from became final.

c) In both cases the order became final after the notice had been filed but before the Court of Appeals had heard argument.

d) In both cases statutes and rules provided that errors not affecting substance should be disregarded (28 U.S.C. 2111, Civil Rule 61; Criminal Rule 52 (a)).

e) In both cases the substantive rights of the parties were not affected, and the procedural requirements of early notice and an opportunity to be heard were fully met.

In similar situations many State Supreme Courts have held as did this Court (Schubert v. School District No. 85, Spartanburg County, 168 S.E.391, 169 S. C. 191; Appeal of Hull, 82 Conn, 386, 73 A. 793; Hays v.s. Dennis, 11 Wash 300, 39 P 658) that a premature notice of appeal is cured when the order becomes final before the appeal is heard.

In addition, the Lemke case has been followed in state civil proceedings. Texas Employment Commission et al vs. Stewart Oil Company, 153 Tex. 251, 267 S.W.2d, 138.

The Court of Appeals apparently relied on the case of U.S. v. Crescent Amusement Company, 1944, 323 U.S. 173, S. Ct. ; L. Ed. . However, that case is not applicable to the case at bar, since it differed in many respects from the Lemke case and the case at bar:

a) It involved a direct appeal to this Court from a District Court under 15 U.S.C. 29;

b) The appeal procedure was by petition and order under old section 345, Title 28, prior to the 1948 Amendments; and

c) The merits of the case were actually presented to the Court, since two appeals were filed and only the premature one was stricken.

The construction of the statute adopted by the Court of Appeals is not within the spirit of the 1938 Federal Rules of Civil Procedure and the 1948 amendment to the Judiciary Code. As said by the Washington State Supreme Court in Hays v. Dennis, 11 Wash 300, 39 P 658 at 659:

> "The statutes governing appeals should be liberally construed, to the end that parties may have a review by this court of the rulings of the superior courts when they so desire. The appeal statute thus construed will require us to give force to a notice of appeal given after the court had announced its decision, although it was before the signing and entering of the formal judgment. For some purposes the judgment may not be complete until thus signed and entered, but, after such announcement, it was so far complete as to sustain a notice of appeal".

To adopt the construction of the Court of Appeals would be to require the preparation and filing, in two courts, of an added and duplicate piece of paper which would serve no practical purpose and would not affect the substantive rights of the parties in any manner whatsoever.

"To insist upon the (petitioner's) subsequently filing a duplicate set of papers *** would be a retreat into formalism wholly inconsistent with the spirit of the *** rules of Civil Procedure" Texas Employment Commission et al vs. Stewart Oil Company, 153 Tex. 251, 267 S.W. 2d, 138.

By reason of the above, Petitioner believes that the Court of Appeals was in error in granting respondent's motion to dismiss the appeal and prays that this court grant a Writ of Certiorari to review said decision.

RESPECTFULLY SUBMITTED,

TURNER, HENDRICK,
FASCELL & BRAKE,
Attorneys for Petitioner.

By_____
ROBERT M. BRAKE

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Filed March 20, 1959 (Caption omitted).

Before RIVES and TUTTLE, Circuit Judges and SIMPSON, District Judge

PER CURIAM: This suit was filed on June 24, 1958, by Carmen M. Lohr against several defendants — the United States of America, the Civil Aeronautics Administration, an agency of the United States of America; Riddle Airlines, Inc., a Florida Corporation; Sandy & Company; and Hector Alexander — to recover damages for the death of plaintiff's husband, a commercial airline pilot who was killed in the crash of a C-46 type aircraft operated by Riddle Airlines near Hollywood, South Carolina on December 17, 1955.

On August 12, 1958, the district court entered an order dismissing with prejudice the second amended complaint as to the defendant United States of America for failing "to show a duty owing the plaintiff by the United States of America, or the Civil Aeronautics Administration for which a cause of action would lie under the Federal Torts Claims Act". On August 25, 1958, this appeal was taken from that order. After the filing of the Notice of Appeal, a motion for summary judgment was granted for Riddle Airlines Inc. on November 12, 1958, and plaintiff was allowed a voluntary non-suit as to the defendants Sandy & Company and Hector Alexander on December 9, 1958, neither of whom had been served with process.

On December 5, 1958, the appellee, United States of America, filed in this Court a motion to dismiss the appeal on the ground that "the order dismissing as to the United States is interlocutory only and not a final decision under 28 U.S.C.A. 1291, since the suit is still pending in the district court against defendants Sandy & Company and Hector Alexander, who have not yet been served". This motion further alleged that:

> "Because the case involves a single claim asserted against multiple defendants, it must 'be governed by the line of cases which have held that an appeal cannot be taken from the lower court's order dismissing one or several defendants while there remains a controversy as to the other defendants on the same claim'. Reagan v. Traders and General Insurance Co. 255 F.2d 845, 847 (C.A. 5). See also, United States v. Woodard, 257 F.2d 805 (C.A.5); Meadows v. Greyhound Corp. 235 F.2d 233 (C.A.5). This rule also applies to parties defendant who have not been served. They are still parties to the lawsuit and service may still be had on some or all of them. Hardy v. Bankers Life & Casualty Co. 222 F. 2d 827, 828 (C.A.7)."

The Motion to dismiss the appeal is well taken since this court is bound by the authorities cited.

Appellant in oral argument, however, insists that the subsequent non-suit taken as to the defendants Sandy & Company and Hector Alexander on December 9, 1958, four days after the motion to dismiss the appeal was filed, is sufficient to convert the district court's order of

August 12 dismissing the amended complaint from an interlocutory order into a final decision under 28 U.S.C.A. 1291 so that the notice of appeal would be timely made. In the alternative, appellant says that her appeal of August 25, 1958, even though taken from a non-appealable order was in the nature of a "continuing" or a "suspending" notice of appeal which attached to any final decision in the case; and that either the order granting the voluntary non-suit on December 9 constituted a final decision or it converted the order dismissing the United States as a party defendant into a final decision with effective date of December 9.

While in sympathy with appellant's plight, we cannot afford to give the Judicial Code or the Rules of Procedure any such fictional construction. Rule 73(a), F.R.C.P., states simply that "the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from . . ." (60 days where the United States is a party.) This "judgment appealed from" must be either a "final decision" under 28 U.S.C.A. 1291 or a certain "interlocutory decision" under 28 U.S.C.A. 1292. Here, the "judgment appealed from" was the order of dismissal of August 12, 1958. Compare: Lemke v. United States, 1953, 346 U.S. 325; U.S. v. Crescent Amusement Co. 1944, 323 U.S. 173, 177. It was neither a final nor an interlocutory decision of the kind which will support an appeal to this Court.

The appeal is therefore

DISMISSED.